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NO. 81-9

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF OF PASCO INTERVENOR APPELLEES

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Questions Presented

1. Is Initiative 350 unconstitutional?

2. If Initiative 350 is constitutional, does its mere existence raise a case or controversy between a school district seeking to desegregate its schools pursuant to a perceived obligation to do so, and the State of Washington?

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Statement

This brief is filed on behalf of the East Pasco Neighborhood Council and a number of individual residents of East Pasco, all of whom will be referred to as the "Pasco Intervenors."

Pasco is a small city in southeastern Washington State. Prior to 1965, the Pasco elementary schools were segregated. Almost all of Negro elementary school children attended a single elementary school in East Pasco, east of the railroad tracks that divide the city. Most of the white children in Pasco attended more modern schools in West Pasco. (J.A. 51-52)

In 1965, without a court order, the Pasco School District adopted a student assignment plan to equalize pupil population by race and socio-economic background. The East Pasco elementary school was closed, and the East Pasco

elementary students were thereafter transported to West Pasco. (J.A. 52) A new elementary school was later constructed in West Pasco. The school was located at least in part in recognition of the fact that there was a student desegregation program being carried out. (J.A. 33-34)

There has never been any effort by the state, the county, the federal government, or any government entity to terminate the Pasco desegregation program. (J.A. 36) Even after passage of Initiative 350, no government official or private individual threatened to attempt to terminate the Pasco desegregation program. (J.A. 36) Passage of Initiative 350 in 1978 caused the Superintendent of the Pasco School District to believe, however, that the thirteen year old Pasco desegregation program could not continue. (J.A. 31) The

Pasco School District therefore joined with the Seattle and Tacoma school districts in this action against the State claiming that the Initiative was unconstitutional. (R. 1)

The plaintiff school districts did not limit their challenge to the unconstitutionality of the Initiative. They went further, to allege that school segregation resulted from "racially discriminatory past actions of constitutent parts or agencies of the governments of the State of Washington and the United States of America." (Complaint, R. 1, paragraph 30; relating to the Seattle School District but joined in by Pasco School District at paragraph 49.) The School Districts alleged that desegregation was "legally required." (Complaint paragraph 1.) They alleged that Initiative 350 would unconstitutionally interfere in the "performance of their duty

as affirmed in their oaths of office. . . ." (Complaint paragraph 44.) They alleged that Initiative 350 would prevent school directors and administrators "from fulfiling their constitutional duties and from carrying out their oaths of office to support and maintain the Constitution of the State of Washington and the United States." (Complaint paragraph 47.) They argued that the duty is obvious and beyond question:

> While on the record now before the court, and without judicial holding on the issue, it is difficult to show plaintiff school districts had any duty to desegregate its schools, but the facts do show, for example, (a) segregated schools in Seattle, and (b) segregated housing patterns. Unless both of these phenomena occurred through some unknown process akin to immaculate conception, it seems reasonable to conclude they involve constitutional concerns of great magnitude. The Initiative will thus interfere with any duty the District has to desegregate its schools.

> [Plaintiffs' Second Memorandum in Support of Motion for Preliminary Injunction, page 23.]

The Pasco Intervenors moved to intervene in the litigation on the grounds that, although the Pasco School District had undertaken to prove that it had a constitutional duty to desegregate its schools, the School District could not be expected to allege and prove its own intentionally discriminatory acts, practices and ommissions. (R. 72)

The District Court divided the case into two phases. (J.S. App. B-2) "Phase I" involved the constitutionality of Initiative 350. "Phase II" was to resolve the question of whether the School Districts were obligated to maintain desegregation programs, even if the Initiative was found to be constitutional.

As the action progressed, the State Attorney General filed various papers with the District Court stating that, notwithstanding the passage of Initiative 350, it was proper for the plaintiff School District to carry out a perceived constitutional duty to desegregate its schools, without first seeking court approval:

> [As construed by the Attorney General, Initiative 350 does not apply] where a school district is constitutionally required to assign students elsewhere. . . . [Brief of State Defendants in Opposition to Motion for Preliminary Injunction, R. 68, page 4.]
>
> Thus, where a given Washington school district finds itself under a constitutional duty to override Initiative 350, it may certainly do so. . . . [Id. at 27]
>
> Initiative 350 only inhibits assignment of students away from schools nearest or next nearest their home. That is all. Even this inhibition, however, must give way to constitutional imperatives which may override. . . . [Id. at 54.]

> [P]laintiffs repeatedly assume, for purposes of their own argument, that Initiative 350 must be interpreted in a fashion which conflicts with the provisions of the United States Constitution (notwithstanding the position taken before the Court by the state's chief legal officer, the attorney general, to the contrary). . . . [State's brief in response to plaintiffs' first motion in limine, page 8.]

> [I]f constitutionally required to do so, school districts could assign students to other than their nearest or next-nearest schools to remedy de jure segregation without a court order. . . . [State's answers to plaintiffs' first interrogatories and requests for admissions, page 9.]

It further appeared that the authors of the Initiative, CiVIC, agreed that school districts did not have to initiate litigation to establish their constitutional rights and duties before proceeding with a desegregation plan:

> Nor does Section 6 require, and it was not intended to require, school districts or minorities to initiate litigation to establish their con-

> stitutional rights or duties. Section 6 is superfluous and was added simply to make clear what is the law. [Intervenor Defendants' Memorandum in Response to Plaintiffs' Motions In Limine to Exclude Evidence, page 5]

Pasco Intervenors therefore filed a Suggestion of Lack of Jurisdiction (R. 215) pointing out that there had never been a genuine and immediate threat by the state to attempt to terminate Pasco's desegregation program, and that, on the contrary, the State had repeatedly acknowledged the right of the Pasco School District to carry out its perceived constitutional duty to desegregate, without first obtaining a court order. Pasco Intervenors argued to the District Court that the so-called "second phase" would involve litigation by the Pasco School District against an opponent (the State) that had never expressed disagreement with the School District's actions.

The District Court concluded that there was a justiciable controversy, stating that the "mere existence of this statute, accompanied by the potentiality of enforcement action, presents a real and immediate threat of injury." R. 375. The Court of Appeals affirmed the District Court's ruling on justiciability.

Summary of Argument

Initiative 350 is unconstitutional for the reasons stated by the District Court, and because it has the genuine and immediate effect of preventing school administrators from voluntarily taking action designed to assure equal protection of the laws. If the Initiative is not unconstitutional and does not have that effect, then there is no justiciable case or controversy at this time requiring further litigation between the Pasco School District and the State.

ARGUMENT

I.

Initiative 350 Is Unconstitutional

Initiative 350 is unconstitutional for the three reasons expressed by the District Court. First, the Initiative creates a classification based upon race without compelling justification. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Hunter v. Erickson, 393 U.S. 385 (1969); McLaughlin v. Florida, 379 U.S. 184 (1964). Secondly, the Initiative has a disproportionately adverse impact on racial minorities, and its adoption was at least in part an intentionally discriminatory act. Washington v. Davis, 426 U.S. 229, 239-41 (1976); Keyes v. School District No. 1, 413 U.S. 189, 205, 208 (1973). Thirdly, the Initiative is overbroad, purporting to outlaw student reassignment in the absence of a

court order even where such reassignment is constitutionally required. See Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1969); Severson v. Duff, 322 F. Supp. 4 (M.D. Fla. 1970); Scott v. District Attorney, Jefferson Parish, State of Louisiana, 309 F. Supp. 833 (E.D. La. 1970), aff'd, 437 F.2d 500 (5th Cir. 1971).

In spite of the facial neutrality of the Initiative, the statute is nothing more than a negative pregnant with the clear and solitary message that student reassignment shall be lawful except if the purpose is to promote racial balance, integrated education, and a unitary school system that affords equality in educational opportunity. In this sense the statute is no different than that struck down by this Court in

North Carolina Board of Education v. Swann, 402 U.S. 43 (1971). The district court so found, and the court's findings are fully supported in the record.

There is a fourth reason that the Initiative is unconstitutional. The Initiative prohibits assignment of school children for purposes of achieving racial balance in the absence of a court order. This Court on numerous occasions has held, however, that in some circumstances a school district may be constitutionally required to reassign children in order to eradicate the effects of past de jure segregation, even without a court order. Initiative 350 would deter school officials from utilizing such constitutionally required desegregation programs in the absence of a court order. It would prevent or discourage school administrators from voluntarily taking

action to remedy disadvantages resulting from past racial prejudice, and would virtually insure judicial involvement in any school desegregation effort involving student reassignment. It would force both school districts and victims of discrimination to litigate to protect and enforce the constitutional right to equal protection of the laws. That burden on the exercise and enforcement of constitutional rights renders Initiative 350 unconstitutional.

This argument is founded upon four fundamental premises, each of which is deeply embedded in Supreme Court law since 1954. The first of these premises is that separate school systems for different races are inherently unequal. The second premise is that a school district that participates in acts or omissions intended to maintain racial segregation in the schools violates the

constitutional rights of its school children to equal protection of the laws. The third premise is that a school board which supervises a district that has been segregated by the intentional acts of those in authority is under a primary obligation and duty, imposed by the Constitution and not the courts, to move immediately to eradicate the effects of this de jure segregation. Dayton Board of Education v. Brinkman, 443 U.S. 526, 537 (1979); Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969); Green v. School Board of New Kent County, 391 U.S. 430, 435-39 (1968); Brown v. Board of Education II, 349 U.S. 294, 299 (1955). "Judicial authority enters only when local authority defaults." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). The fourth and final premise is that a school board

in some, though clearly not all, circumstances, will be obligated by the Constitution to assign students to schools other than their neighborhood schools, and, if necessary, to provide bus transportation for those students in order to eliminate the effects of de jure segregation. North Carolina Board of Education v. Swann, 402 U.S. 43 (1971); Davis v. Board of Commissioners of Mobile County, 402 U.S. 33 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 29-31 (1971).[1]

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[1] This remedy may be required in relatively few cases, as, for example, where school authorities by placement of school facilities have made integration by any other means impossible. This situation has occurred in Pasco since adoption of its desegregation program in 1965. See footnote five, infra. Such circumstances leave transportation of students as the only viable means of eradicating the constitutional violation. "Desegregation plans," as this Court stated in 1971, "cannot be limited to the walk-in school." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30 (1971).

In sum, this Court has established that, even without a court order, in some cases school districts must transport students in order to insure equal protection of the laws. Courts must intervene to impose such a remedy only secondarily, if the responsible state officials abdicate this constitutionally imposed duty.

It follows that a student who is being denied his or her rights should attempt to enforce these rights first by application to the school districts, and only if this effort fails, by application to the courts.[2]

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[2] Approaching a school board to find a solution is less likely than service of a complaint to engender hostility. More importantly, a family attempting to enforce its rights may by negotiation achieve a goal that could cost tens or hundreds of thousands of dollars, and years of time and effort, to achieve through litigation. The volumes of the United States Reports are replete with enormously expensive multiparty desegregation cases that have been proceeding for more than half a decade. Resolution through voluntary, non-judicial processes is the most inexpensive and efficient way to proceed.

Initiative 350, by plain language, prohibits assignment of students to other than the nearest or next nearest school for purposes of achieving racial balance, except in compliance with a court order.[3] The Initiative thus infringes upon the mandate of the Constitution by preventing school districts from complying with their obligations -- totally independent of court order -- to remedy past de jure segregation, and by foreclosing to victims of racial preju-

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[3] The Initiative thus shifts the burden of proof from the opponents of a desegregation program to the proponents. If the Initiative means what it says, before conducting a desegregation program involving mandatory student reassignments, a school district must undertake to prove, in a court action it initiates, that it has a duty to desegregate, and that a busing program is the appropriate method to do so. This is the virtual reverse of how the system should work. Litigation on these issues should be discouraged. The federal courts should avoid desegregation litigation to the extent they can. The states and their school districts should be encouraged to solve their problems without the primary involvement of the federal courts.

dice the most efficient and least expensive method of restoring their rights.

It is irrelevant to the constitutionality of Initiative 350 that it might be interpreted, not as it reads, but as the State of Washington has insisted it should read, to permit busing for racial balance wherever constitutionally required, even without a court order. Even so interpreted, the effect of the law on the actions of school officials would be the same -- school officials would in all likelihood decline to institute or continue busing programs in the absence of a court order.[4] The existence of an obligation to remedy de jure segregation depends upon the complex history of conduct

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[4] That is apparently what would happen in this case if the Initiative is upheld. The school administrators of the Pasco and Seattle school districts testified that they would feel compelled to terminate their programs if the Initiative was allowed to stand. (J.A. 31, 75.)

related to race in a school district, and on the past and present actions of state and local administrative officials. Termination of racial balancing programs because of Initiative 350 is the more clearly marked pathway. Any school official genuinely concerned with obeying state law -- as most surely are -- will find it much easier to take a passive posture rather than invite litigation from antibusing parents or from the state. Planning for desegregation programs is obviously more difficult if done in the face of a statute that, if it means what it says, prohibits such programs without a court order, and invites the intervention of those opposed to busing.

Under the law as explicated by this court since Brown, de jure segregation exists only where intentional official action has caused or contributed to

segregated schools. School officials thus could not voluntarily institute a plan to achieve racial balance, even under the Washington Attorney General's interpretation of Initiative 350, without admitting, by words or deeds, that there has been a discriminatory governmental purpose leading to segregation of the schools.[5] It does not reflect ill on

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[5] Because of the peculiar circumstances in Pasco, it may be easier for the school administrators to acknowledge the duty to continue the transportation program. The East Pasco elementary school was closed in 1965, and after the busing program was developed, new schools were constructed in West Pasco. This was done in part in recognition of the student transportation program. (J.A. 32-36.) The effect of termination of the busing program because of Initiative 350 would be to worsen the stituation from that which existed prior to 1965. Hispanic, Asian, Negro and American Indian students would be concentrated in older schools to the east, but outside their neighborhoods. The white students further to the west would be assigned to the newer schools within their neighborhoods. (J.A. 51-56.) There can be no genuine dispute about the constitutional duty to maintain a mandatory student assignment program in Pasco, considering the pattern of school construction. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971).

public school officials to suggest that they will be reticent to make such admissions. In the absence of Initiative 350, Pasco school officials voluntarily instituted busing programs to cure de jure segregation, but in doing so they did not have to call themselves racists. Appellants' suggestion that the more liberal interpretation of the Initiative will cure its constitutional problems is thus disingenuous; school boards would simply be unwilling to reassign students in the face of the Initiative's prohibition without a court order requiring them to do so.

A statute that flatly prohibits assignment of students to achieve racial balance, except as permitted by court order, will almost certainly prevent voluntary initiation of such programs even when they are perceived by school officials to be required by the Consti-

tution. It will discourage -- indeed prevent -- school officials from attempting to satisfy their obligations under the Constitution, and it will force school districts and affected individuals into years of litigation to assure equal protection of the laws.

The courts are not lone sentinals guarding the rights of citizens to equal protection of the laws. Every citizen is entitled to equal protection, without first obtaining a court order, and every state official is obligated to ensure that the citizens of the state receive equal protection, without first being served with a court order. Initiative 350 has the effect of preventing or discouraging school administration officials from voluntarily taking action designed to assure equal protection of the laws. As such it improperly burdens the exercise and enjoyment of constitu-

tional rights, and violates the Equal Protection Clause of the Constitution.

II.

If the Initiative Is Constitutional, There Is No Justiciable Case or Controversy

If the Court concludes that despite Initiative 350, the Pasco school administrators may continue to reassign students to achieve racial balance as required by the Constitution, and if the Court concludes that the Initiative does not have the effect of preventing or discouraging the Pasco school administrators from voluntarily taking action designed to assure equal protection of the laws, then there is no justiciable case or controversy between the Pasco School District and the State of Washington, and the Pasco School District complaint should be dismissed.

Justiciability is a legal concept without fixed content or susceptibility

to verification. Poe v. Ullman, 367 U.S. 497 (1961).

> The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, and not hypothetical or abstract.'

Babbitt v. United Farmworkers National Union, 442 U.S. 289, 298 (1979). Adherence to the requirement insures that the issues in a lawsuit will be thoroughly framed and vigorously contested. The presence of injury to the plaintiff is the keystone of the justiciability requirement.

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently

> held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.
>
> Moreover, when a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily. . . . [C]oncrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220-21 (1974). Actual injury or the immediate threat of actual injury is a firm and

longstanding prerequisite for constitutional adjudication by a federal court. Massachusetts v. Mellon, 262 U.S. 447 (1923); Stearns v. Wood, 236 U.S. 75 (1915).

If the Initiative meets constitutional requirements and does not prevent or discourage the Pasco school administrators from reassigning students as required by the Constitution, then the Pasco school district has sustained no actual injury in this case by the mere existence of the Initiative. No one has even threatened to attempt to utilize the statute to terminate the Pasco plan. The Pasco school district has not been called upon to terminate its student assignment program. Compare Lake Carrier's Association v. MacMullan, 406 U.S. 498, 507-508 (1972). It is entirely speculative at this time whether a real controversy may develop as to

Pasco's programs. So long as the Pasco School District is free to continue its voluntarily undertaken desegregation program, without fear of violation of the statute if it does so, there is no issue requiring "Phase II" of this lawsuit.[6]

The mere possibility of an attempt to terminate the Pasco program because of Initiative 350 does not constitute the immediate threat of enforcement necessary to justify resolution by a

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[6] In Sea Ranch Ass'n v. California Coastal Zone Conservation Commissions, 537 F.2d 1058, 1063 (9th Cir. 1976), the court pointed out that an allegedly unconstitutional statute clear on its face could be challenged without awaiting its application or threat of application, since the very existence of the restriction created the necessary case or controversy as to any party having standing to challenge it. The court pointed out, however, that where the constitutional question presented to a federal court turns on the specific application of the statute, no case or controversy is presented absent some indication that the plaintiffs' rights had been subjected to a real and immediate threat. Applying the Sea Ranch analysis here, if the Initiative is constitutional "on its face," then a real and immediate threat will be necessary before "Phase II" is justiciable.

federal court of the constitutional issues proposed to be tried in Phase II of this litigation.

> A long line of cases holds that federal courts may not decide suits in which the adversity of the parties rests on the happening of some event whose future occurrence is in doubt. This rule effectuates several sound policies. It conserves judicial energies for litigants who have a real need for official dispute resolution; it ensures a concrete and adverse presentation of factual and legal issues to protect against ill-advised adjudication; and it restrains the judiciary from injecting itself into the affairs of the legislative and executive branches.

Kidwell v. Meikle, 597 F.2d 1273, 1289 (9th Cir. 1979).

The possibility of an attempt to terminate the Pasco program is in serious doubt. No state official has threatened "enforcement" against Pasco.[7] Neither

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[7] It is unclear what "enforcement" would be. The statute contains no enforcement provisions and no penalties.

the State nor CiVIC was interested in the Pasco program until Pasco joined in this lawsuit.[8] No party to this lawsuit has contended that Initiative 350 should be read and applied literally. The state has consistently taken the position that a state or school district has an obligation to cure the effects of de jure segregation, and that the Initiative should be read to permit such

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[8] Although the complaint sought relief on behalf of three school districts, including Pasco, the complaint did not, aside from identifying the Pasco school district, devote even one sentence to a discussion of the history of the desegregation program in Pasco. As the case developed, the reasons for this absence of detail became clear. There was no evidence that the State of Washington, or CiVIC, or any proponents of Initiative 350, or any opponents of busing in Seattle, or anyone else had any desire to bring an end to the Pasco desegregation program. The record indicated that CiVIC drafted Initiative 350 entirely in response to the Seattle plan, and the District Court so found. (Findings of Fact 7.1-7.9, R. 393.)

action even in the absence of a court order.[9] If the State were to seek in some way to enforce the statute in Pasco, its first step, necessarily, would be to examine the history of the school district to ascertain if such an obligation exists. The State could conceivably conclude that the program was constitutionally unwarranted, and it might start an action to compel its termination. Alternatively, the State might choose to simply accept the judgments of school administrators, and

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[9] The State maintains this position in its brief on this appeal. See Appellants' Brief, pages 38-39:

> The appellants -- charged by the Complaint with enforcement of Initiative 350 -- have insisted from the outset upon a construction of the statute which recognizes and provides for the constitutional necessity to undertake mandatory desegregation steps in certain instances without first having to seek an authorizing court order of some sort.

avoid a dispute. Or the State might conclude that the current desegregation program, or some revised program,[10] is necessary to comply with dictates of the Constitution. Following investigation, the State might actively support an amended Pasco desegration program, and oppose any effort to terminate the desegregation efforts. Considering the many different possibilities, the threat of "enforcement" is not sufficiently genuine and immediate to create a case or controversy justiciable by the federal courts.

The case or controversy issue is of more than academic importance. If the

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[10] In arguing that no burdens are imposed on minorities by Initiative 350, the State in its brief alleges that the Pasco plan is subject to termination because only the East Pasco children are transported. Appellants' Brief, pages 15-16. Under the circumstances, a "two-way" transportation system might be required. The federal courts should not address the issue, however, until a real case or controversy is presented in that regard.

Initiative is found to be constitutional and if the complaint is not dismissed, the case would apparently proceed to "Phase II" at which time the Pasco School District would undertake to prove that it was, and is, obligated to re-assign students in order to desegregate its schools. This would apparently occur even though the defendant has never denied the existence of that obligation, and even though it has repeatedly indicated that if there is a duty to desegregate the schools, plaintiff should "certainly" do so. The district court would be asked to approve the Pasco student assignment policies even before any dispute developed concerning those policies. While the school officials might well believe that they had such a duty, they could not be expected to energetically advocate their own culpability, so the presence of the

Pasco Intervenors would be necessary to assure that the burden of proof was carried. A massive, time consuming and expensive multiparty lawsuit would result, even though there was no genuine controversy to generate it.

The Ninth Circuit addressed the justiciability issue, and concluded based upon four factors that the case was justiciable. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338, 1342 n.1 (9th Cir. 1980). Pasco Intervenors assert that the Ninth Circuit in so concluding misconstrued the case as it relates to Pasco.

First, the Court of Appeals noted that "this is a highly specific statute, clearly applicable to Pasco's student assignment policies". The statute may indeed be specific in some sense, but it is emphatically not applicable to Pasco's school assignment policies. If

this statute is interpreted in the manner in which the State Attorney General in its brief has indicated that it should be interpreted, then the statute clearly would not be applicable to a constitutionally required busing program.

The Court of Appeals observed, secondly, that Initiative 350 is a recent statutory enactment and "not a law which has lain moribund for years." Pasco Intervenors suggest that the age of a statute has little bearing on the likelihood that it would be applied in such a manner as to force Pasco to terminate its desegregation program. The law might well have lain moribund for many years, at least as to Pasco, if the Pasco School District had permitted it to do so.

Thirdly, the Court of Appeals stated that parties in a legal status

identical to that of Pasco, meaning, presumably, Seattle, had been the subject of immediate threats of enforcement. By virtue of the history of the enactment of Initiative 350, and by virtue of the almost certain existence of distinctions in the history of racial integration in the two school systems, the Pasco legal status is not remotely like that of Seattle. Threats of enforcement against Seattle, immediate or otherwise, have little bearing on the likelihood of enforcement in Pasco. In any event, the threats of enforcement in Seattle were vague and ambiguous at best. (R. 1, attachment.)

Finally, the Court of Appeals observed that Initiative 350 is a civil rather than a criminal statute, and imposes an affirmative duty to comply. In support of this proposition, the Court of Appeals cited Lake Carriers

Association v. MacMullan, 906 U.S. 498 (1972). That case, however, is obviously different. The court in Lake Carriers found that state authorities had already "sought on the basis of the act and the threat of future enforcement to obtain compliance as soon as possible." Lake Carriers Association v. MacMullan, supra, 406 U.S. at 507. Here, there has not even been an investigation by the state into the necessity for a Pasco desegregation program, let alone a threat that the Initiative would be "enforced" to obtain compliance as soon as possible in Pasco.

A "Phase II" action to establish the existence of de jure segregation, and to craft a desegregation program to remedy the wrong, places huge burdens on the courts and litigants. This Court should refuse to permit involvement of the federal courts in these sensitive

issues of social and local policy unless and until it is clear that the issues cannot and will not be satisfactorily resolved by the school district and the state without federal court intervention.

Litigation such as proposed for "Phase II" will only be necessary if the Pasco School District fails to carry out its duty to continue to desegregate its schools. This Court should neither require, nor permit, the Pasco School District to force the State or the Pasco Intervenors into desegregation litigation at this time. Instead, this Court should expressly hold that the Pasco School District must proceed in its wisdom in accordance with its perceived duty and without seeking prior approval from the district court. The Pasco School District should not flee until someone pursues it. It should not